In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 40

TERRITORY OF ALASKA,

Petitioner,

vs.

AMERICAN CAN COMPANY; FIDALGO ISLAND PACKING COMPANY; LIBBY, McNEILL & LIBBY, INC.; NAKAT PACKING COMPANY; NEW ENGLAND FISH CO.; P. E. HARRIS COMPANY, INC.; PACIFIC & ARCTIC RAILWAY & NAVIGATION CO.; and OCEANIC FISHERIES CO.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

I. INTRODUCTION.

Petitioner, Territory of Alaska, herewith makes reply to the Brief for the Respondents.

Initially, at page 13 of Respondents' Brief, the assertion is made that the Territory of Alaska is not seriously challenging the validity of the repealing act, which is Chapter 22, SLA 1953. The implication is that the constitutional question of the validity of the repeal is raised solely to "bring the case within the scope of the rules" relative to granting certiorari.

Petitioner states that this question is presented as a bulwark of its case and as alternative affirmative relief sought herein. Respondents themselves, at page 35 of the Brief for the Respondents, acknowledge the earnestness of Petitioner's point by stating:

> ". . . If it is unconstitutional it must fall and the court will not give it a construction not warranted by its terms in order to avoid such a result.
>
> "The rule of construction asserted by Petitioner may be correct but it has no application here. The Repealing Act by its plain terms saves some taxes and not others. If this offends the Constitution then the Act is void and the courts are powerless to change it. . . ."

The charge (Resp. Br., p. 14) that the validity of Chapter 22, SLA 1953, is a constitutional question which Petitioner raised only to bring the case within the rules of this Court regarding the granting of certiorari is obviated by the fact that presence of a "constitutional question" is not a condition to a grant of certiorari as implied by Respondents.

The jurisdiction of appeals from Alaskan courts is laid to the Court of Appeals for the Ninth Circuit. 62 Stat. 930, 28 U.S.C., § 1294. By way of writ of

certiorari, *all* cases in the courts of appeals may be reviewed by the Supreme Court. 62 Stat. 928, 28 U.S.C., § 1254. By Rule 19 of the Rules of the Supreme Court, a writ of certiorari is a matter of sound judicial discretion, the grant of which is predicated solely upon "special and important reasons."

The necessity of a "constitutional question" or, more properly, a federal question is found as a prerequisite to the grant of certiorari to review a decision of a state court.

Elsewhere (Resp. Br., p. 2) (while referring the Court to a telegram which purports to be from the Tax Commissioner of the Territory of Alaska and which is outside the scope of the record), Respondents object to the introduction of a statement by Petitioner not supported by the record (Pet. Br., p. 6) as to the number of people to be affected by this suit. The statement was made in proper conformity to Rule 19 of the Rules of the Supreme Court to indicate the importance of the litigation.

II. THE ARGUMENT THAT PETITIONER HAS NO AUTHORITY TO CHALLENGE THE VALIDITY OF THE REPEAL.

It is the clear duty of the Attorney General to engage in a suit for the collection of revenue under Territorial law. See § 9-1-5, ACLA 1949 (Appendix "A").

Further, the Attorney General is broadly empowered to challenge the validity of all statutes under § 9-1-8, ACLA 1949 (Appendix "B").

Respondents cite *Commonwealth of Massachusetts v. Mellon, Secretary of the Treasury,* 262 U.S. 447 (1923), as controlling for the proposition that since the Petitioner, Territory of Alaska, is not of the class discriminated against, it therefore has no standing to challenge the validity of the act.

Such indicates a misconception of the import of the cited case. The authority of that case is properly laid to the proposition that a state may not, as *parens patriae,* act to protect its citizens from the operation of a *federal* statute enacted by Congress. The underlying theory is obvious in a federated form of government. There is dual citizenship. When state citizenship is involved, the state properly acts on behalf of its citizens. (See *Missouri v. Illinois,* 180 U.S. 208, 241 (1901), as cited in the *Massachusetts v. Mellon* case, *supra.*) Federal citizenship is involved when the relationship is between the individual and the national government and there is no room or need for state intervention. In such relationship, the United States is the protector. This concept is the whole of the impact of *Massachusetts v. Mellon, supra,* as may be seen at page 485 *et seq.* of the official reports. As to cases distinguishing and explaining *Massachusetts v. Mellon, supra,* see *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 445 (1944), and *Hopkins Savings Assn. v. Cleary,* 296 U.S. 315, 339, *et seq.* (1935).

The instant case involves an imputation of invalidity by the Petitioner, Territory of Alaska, of a Territorial statute. There can be little doubt that the Territory has responsibilities toward its people. The analogy to a state is logical in this instance.

The theory of territorial government has ever been to afford complete and statelike local autonomy consistent only with the national plenary power. (See *Clinton, et al. v. Englebrecht,* 13 Wall. 434, 441 (1872).) Consequently, it is contended that Petitioner (over and above the express statutory authority found in ACLA 1949 (Appendix "B") to challenge the constitutionality of territorial enactments) may raise the discrimination herein involved to the extent that a state may do so.

There is little question that a state, through its chief legal officer, has great standing to challenge legislation which is contrary to the state or Federal Constitution. It has been held that where the validity of an act of the state legislature is in doubt, the state is always an interested party, and its Attorney General may exercise his judgment as to what type of action may be brought to have the matter determined. *State ex rel. Brewster v. Doane,* 98 Kan. 435, 158 P. 38, 40. See also *Ex parte Bass,* 328 Mo. 125, 40 S.W.2d 457, 460; *State ex rel. Porterie v. Walmsley,* 181 La. 597, 160 So. 91; and *People v. Building Maintenance Contractors' Ass'n.,* 41 Cal.2d 719, 264 P.2d 31, 36. The power of the Attorney General to attack statutes which in his opinion are unconstitutional is not a mere right but a duty, and the rule that one may not attack the validity of a statute unless his rights are affected applies only to private persons. *State ex rel. Landes v. S. H. Kresse & Co.,* 115 Fla. 189, 155 So. 823, 826, 825; *Wilens v. Hendrickson,* 133 N.J. Eq. 447, 33 A.2d 366, 375. This power has also been recognized in prosecuting attor-

neys because of the public interest involved. *State ex rel. Evans v. Brotherhood of Friends,* 41 Wash.2d 133, 247 P.2d 787, 792.

Further, whether or not the Territory of Alaska in relation to the people of Alaska may act as *parens patriae,* Petitioner has standing under the rule laid down by *Buchanan v. Warley,* 245 U.S. 60, 72 (1917). A person who is directly injured by the legislation may attack the discriminatory statute even though not of the class discriminated against. The theory underlying the objection to an attack by a non-discriminated party is to ensure that the controversy be real and vital and to prevent the championing of the cause of another. However, the rule becomes uselessly broader than the purpose it is to serve if the power to assail the statute is limited solely to a member of the discriminated class. One who is directly aggrieved by the legislation, and as to whose claim the determination of a constitutional question is fairly relevant, should be permitted to raise the question. See *Quong Ham Wah Co. v. Industrial Accident Commission,* 184 Cal. 26, 192 P. 1021.

Also, even if the application of the rule were so restricted, it is to be seen that there is a well-recognized exception permitting a person who is not a member of the class discriminated against to attack the statute as being an invalid discrimination. The exception is when no member of the class so discriminated against is in a position to raise the question. *Green v. State,* 83 Neb. 84, 119 N.W. 6. Such a situation now confronts us in the instant case. Those who have paid the tax in Alaska have done so under

a valid law. Having paid the tax, they have no recourse, and the issue cannot be resolved unless here raised by Petitioner.

In closing upon this point, Petitioner would address notice to the case of *Carroll v. Socony-Vacuum Oil Co.*, 136 Conn. 49, 68 A.2d 299. That case is important in its discussion and disposition of two points raised herein, to wit: Petitioner's standing to challenge the validity of Chapter 22, SLA 1953, and the unconstitutional discrimination involved in that repeal. That case involved a gasoline tax collected by distributors of gasoline from their vendees, one per cent of which by statute was allowed to be withheld by the distributor as payment for the collections. Subsequently, the tax levying act was amended and the provision allowing the distributors to retain the one per cent collection fee was omitted. However, the omitted provision was erroneously printed in the state cumulative supplements and, consequently, for many years the distributors continued to retain the tax. In *Anastasio v. Gulf Oil Corp.*, 131 Conn. 708, 42 A.2d 149, it was held that the provision had been repealed prior to inclusion in the cumulative supplements. Thereupon, thirty-one distributors paid over $7,000.00. The General Assembly then passed a statute expressly allowing those who had erroneously withheld the one per cent to retain the moneys so withheld. The state attacked this latter statute as being an illegal discrimination against the thirty-one who had paid. The court held that the state could properly raise the question of the discrimination although not of the injured class. Further, the court held that a statute that relieves

from liability those who have not paid, and at the same time makes no provision for refunding the sums to those who have paid, is such as to violate the Fourteenth Amendment and the Constitution of the State of Connecticut. The court then remanded the suit for consideration of the circumstances under which the thirty-one people paid the tax.

This case is directed to the Court's attention because of its rare similarity to the problem at hand and to the issues herein raised.

Petitioner further asserts that it has standing to foster the issue of unconstitutionality if for no other reason than to support the proposition (See Pet. Br., p. 16) that where an act is susceptible of more than one construction, one of which is of doubtful validity, the courts should adopt that interpretation which renders the act valid.

III. THE QUESTION OF WHETHER THE FOURTEENTH AMENDMENT APPLIES TO THE TERRITORY OF ALASKA.

Respondents contend that the Fourteenth Amendment does not apply to the Territory of Alaska, citing *Boling v. Sharpe*, 347 U.S. 497 (1954) and *Farrington, Governor v. Tokushige*, 373 U.S. 284 (1927) (Resp. Br., p. 16). Neither case stands as authority for the proposition that the Fourteenth Amendment does not govern the Territory of Alaska.

In *Boling, supra*, this Court held that the Equal Protection Clause of the Fourteenth Amendment is not applicable to the District of Columbia. In *Far-*

rington, supra, it was held that the Due Process Clause of the Fifth Amendment applied to the Territory of Hawaii. However, in both cases it was expressly pointed out that the Fifth Amendment, which applies to territories, and the Fourteenth Amendment, which is a restriction upon the sovereign states, are not separate and distinct concepts of political protection. They are not mutually exclusive.

In the *Boling* case, it was said at page 499 that the Equal Protection Clause:

> ". . . .is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be a violation of due process."

It was said that a classification by race was such as to deprive the unfavored class of due process. It is here asserted that a classification which classifies a delinquent taxpayer for favoritism is also faulty under the Due Process safeguard of the Fifth Amendment. It cannot be justified in terms of the theory of equality before the law.

Respondents have assumed the Fourteenth Amendment only restricts a state of the Union, since in its terms it applies only to a state. They assume Congress has not used its plenary power to protect citizenship of the Territory of Alaska from an unequal burden of laws. This implies that the legislature of a mere territory is more powerful than a sovereign state.

Such is not the case. The Fourteenth Amendment in its entirety restricts the territorial legislature, and not solely through any similarity of concepts with the Fifth Amendment's Due Process Clause. This is so because Congress, in its plenary power over territories, has extended the Constitution to the Territory of Alaska. Section 2-1-1, ACLA 1949, reads as follows:

> "Constitution and laws of the United States extended: Continuation of existing laws. The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. All the laws of the United States passed prior to August 24, 1912, establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; except as herein provided all laws in force in Alaska prior to that date shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature. [37 Stat 512; CLA 1933, § 463; 48 USC § 23.]"

In *Hess v. Mullaney,* (9th Cir. 1954), 180 F.2d 805, 817, it was held as follows:

> "It therefore appears that whether we were to hold that the Fourteenth Amendment applies to Alaska in the same way, and for the same reasons that the Fifth Amendment does, or whether the limitations stated in this amendment have been made applicable to territorial legislation by this section of the Organic Act, the tests and standards to be applied are the same. . . ."

The court then proceeded to liken the Equal Protection Clause to 48 U.S.C., § 78, § 48-1-1, ACLA 1949, of the Organic Act (See Pet. Br., p. 4). Since § 48-1-1, ACLA 1949, is hereby likened to the Equal Protection Clause, the concepts of that clause are also brought into play by Petitioner's challenge of the validity of Chapter 22 under that section of Alaska's Organic Act (Pet. Br., p. 15).

Therefore, the Fourteenth Amendment's Due Process Clause is pertinent either directly, which need not be decided, or through the extension of the Constitution by Congress to the Territory of Alaska. Further, it is illuminating as to an explanation of the meaning of 48 U.S.C.A., § 78, § 48-1-1, ACLA 1949.

Respondents, at page 20 *et seq.* of their brief, state that a legislature has broad power as to classification. It is submitted that a power to classify a group by reason of its tax delinquency for the purpose of awarding it with a forgiveness of taxes is a very broad power indeed. It is said that the burden is on Petitioner to negative every conceivable basis which might support the classification. Since reward for tax delinquency is the result of such action, the classification is "hostile and oppressive discrimination" on its face. No recorded case has ever held or implied such a classification to be proper.

Beginning at page 17 of Respondents' Brief, it is asserted (citing cases) that under the common law a repeal of a statute extinguishes all penalties and liabilities created by the statute unless kept alive by special provision. Respondents then suggest that the

rule is of long standing and, consequently, it does not violate the Constitution or the Organic Act of Alaska. Petitioner contends that the validity of the rule is not in question here, but rather its application. The statute must be tested, not by its form, but by its operation and effect. *Near v. State of Minnesota*, 283 U.S. 697, 708 (1931).

IV. THE RULES OF STATUTORY CONSTRUCTION.

Petitioner will now consider the objections of Respondents to two of the rules of construction advanced by Petitioner in its Brief on Merits:

1. *The First Rule.* On page 35 of Respondents' Brief, the rule that the courts must seek a valid construction of an act which is susceptible of more than one construction is considered. Respondents simply emasculate the rule by stating that if the act is unconstitutional it should fall, and if it is constitutional it should stand. Also, Respondents would believe that this repeal (which compelled the court below to resort to more than one rule of construction) is in plain terms.

2. *The Second Rule.* In attacking the second rule, that an unjust result is to be avoided, set forth by Petitioner (Pet. Br., p. 16), Respondents argue that there is no injustice. However, the district court in its opinion (R. 67) recognizes the latent injustice to the class of taxpayers who have paid the tax. Also, while probably the most disputed abstract ideal is justice, it is Petitioner's position that none can help but

feel that the uneven burden placed upon those who paid the tax is inequitable.

V. OBJECTION TO CONSIDERATION OF HOUSE BILL NO. 3 AND SENATE BILL NO. 5 OF THE TWENTY-FIRST SESSION OF THE ALASKA LEGISLATURE.

Respondents (Resp. Br., p. 34) object that the original Senate and House bills encompassing the repeal later found in Chapter 10 cannot be considered here for the reason that they are not in the record, that Respondents have not been given a chance to rebut them, that the case is not now open for the reception of evidence, and that the case was not open for the reception of evidence in the trial court. It is further objected that Senate Bill No. 5, unlike House Bill No. 3, was never even offered in evidence.

The appellate court below (R. 88) "held" that Senate Bill No. 5 and House Bill No. 3 are indistinguishable. Therefore, Senate Bill No. 5, although not formally offered in evidence, was before the court; and had House Bill No. 3 been admitted in evidence, it would have been simple enough as recognized by the appellate court (R. 87, 88) to direct the district court's attention to page 32 of the 1953 Senate Journal. By the appellate court's holding that the above-cited page of the Senate Journal would show the two bills to be indistinguishable, it is to be seen that Respondents are in no way prejudiced by not having had Senate Bill No. 5 offered in evidence at the same time House Bill No. 3 was offered. It is

also to be noticed that an authenticated copy of Senate Bill No. 5 was filed with the Territory's Brief (see R. 87).

The Court's attention is directed to the reporter's transcript of plaintiff's offer of proof on October 28, 1955 (R. 48), where the court stated:

> ". . . In such a hearing we cannot introduce evidence of something other than the acts of the Legislature or such matters as Journal entries, of which the Court could take judicial notice, indicating any such intent or indicating the question of intent. . . ."

After making this ruling, the court later in the hearing was of the opinion that the matter should be decided on the merits (R. 52) and thus the hearing became more than a hearing on a procedural question. Consequently, inasmuch as the court first rejected Petitioner's offer of evidence and then proceeded to decide the case on the merits, the door was completely shut upon any evidence which could shed light on the legislative intent other than that of which the court decided to take judicial notice. Thus, this aspect of the case was decided in a vacuum of legislative intent. As to a discussion of the court's duty to make use of all available aids to determine the meaning and intent of the legislature, see Petitioner's Brief on Merits, page 23 *et seq.* By way of cogency rather than redundancy, Petitioner would apprise the Court of the fact that merely inspecting the Senate and House Journals of the Territory of Alaska will give no reward other than a hollow knowledge of the title of bills intro-

duced, amended, and passed, and the ayes and nays of the individual legislators thereon. It is this brief skeleton of legislative history to which the courts below have restricted themselves. The Court's notice is directed to Appendices "B" through "K" in Petitioner's Brief on Merits. The Territory of Alaska attempted to shed light upon the austerity of those proceedings as recorded in the legislative journals by introducing in evidence the original of House Bill No. 3, which was identical to Senate Bill No. 5, and which showed the express attempt to forgive these taxes as rejected by the Legislature.

In short, the Legislature rejected a bill which would have expressly forgiven this tax and then adopted a bill (Chapter 22) which merely repealed the Alaska Property Tax Act and saved taxes accruing after the effective date of the repeal. Respondents would have us believe that a responsible legislature, after considering and rejecting a bill which by its express terms would have forgiven an amount of tax in excess of ten per cent of the current revenues, turned around and accomplished the same forgiveness by a vague implication.

The true interpretation of the repeal is found in the remarks of Judge Healy in dissenting from the majority at page 89 of the Record, which is that there is no special saving clause relating to prior taxes accrued under the Alaska Property Tax Act. The material part of Chapter 22 is Section 2(a), which saves, for municipalities, schools, and public utility districts, (1) taxes which had accrued between the

date when general liability for the tax would cease (January 1 of the current year) and the date of the passage of the act, and (2) future taxes which would be levied during the current fiscal year. Consequently, this section does not constitute a special saving clause which could be in conflict with the Territorial General Saving Statute. The Territorial General Saving Statute relates solely to tax liability before January 1 of that year.

CONCLUSION.

For the reasons stated herein and in Petitioner's Brief on Merits, it is submitted that the judgment below should be reversed.

Dated, Juneau, Alaska,
November 1, 1958.

Respectfully submitted,

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(Appendices Follow.)

Appendix "A"

Section 9-1-5, *Alaska Compiled Laws Annotated* 1949

Duties. The Attorney General of Alaska shall be the official legal advisor of the Governor, the Treasurer, the Secretary, and other officers of the Territory. He shall bring, prosecute and defend in the name of the Territory, all necessary and proper actions or suits for the collection of the revenue under Territorial laws; he shall file informations and prosecute all offenses against the revenue, and other laws of the Territory, prosecution of which is not otherwise provided for; he shall when requested by the Legislature or any member thereof, give legal advise [advice] concerning any law or proposed law or legislative measure; he shall take cognizance of all memorials passed by the Territorial Legislature, shall urge on the various organizations or persons to whom such memorials are addressed, the necessity for the action prayed for in the memorial, and shall submit to the next Legislature, a report on the memorials theretofore passed by previous Legislatures; and all such other duties as may be required by law, or as usually pertain to the office of Attorney General in a Territory; and he shall make through the Governor, to the Legislature, at each regular session thereof, a report of the work and expenditures of the office, and upon needed legislation or amendments to existing laws.

[*Bills, memorials and resolutions.*] It shall be the duty of the Attorney General to draft and prepare in proper form for introduction such bills, memorials or

resolutions as may be requested by any member of the Legislature, the Governor, or any other Territorial official. He shall consult with members, officers and committees of the Legislature, when requested, upon pending bills or measures, and at the request of a member of the Legislature shall prepare amendments to bills, memorials or resolutions under consideration by either house.

Requests for the preparation of bills, memorials, or resolutions shall be transmitted to the Attorney General and the Attorney General shall keep a complete record of all requests received of proposed bills, memorials and resolutions in progress and completed, and such other information as may be requisite to expedite legislation and to avoid duplication of effort. Such record shall be open to inspection by any member of the Legislature, or any Territorial official; provided, however, that the name of the person submitting a request shall not appear in the record if the person requesting so desires. Any member of the Legislature, the Governor, or any Territorial official may examine this record and upon written request the Attorney General shall transmit, in writing, any information therefrom desired by such person.

Appendix "B"

Section 9-1-8, *Alaska Compiled Laws Annotated* 1949

Instituting or participating in litigation: Testing validity of laws: Private suits involving questions of importance to Territory. Whenever the constitutionality or validity of any statute is seriously in doubt, and the enforcement of such statute affects the Territory or a considerable portion of its people or important industries therein, suits or actions may by the Attorney General be instituted in the name of the Territory in any court to determine the constitutionality or validity of such law. And such proceeding may be had for that purpose either by means of suits to restrain, or by means of action to compel, the enforcement of such law, or by any other appropriate proceeding that will bring the question at issue fairly before the court. Or, the Attorney General may for such purpose institute or defend actions or suits for private individuals or corporations, and at the expense of the Territory, whenever the importance of the questions involved to the inhabitants of the Territory shall warrant it; but no such proceeding shall be instituted or maintained in the name of the Territory or at its expense except with the approval of the Governor, Auditor and Treasurer or any two of them in the manner hereinafter provided.